

ESTTA Tracking number: **ESTTA373868**

Filing date: **10/18/2010**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91196417
Party	Defendant Everfresh Food Corporation
Correspondence Address	EVERFRESH FOOD CORPORATION EVERFRESH FOOD CORPORATION 501 HURON BLVD SE MINNEAPOLIS, MN 55414-3199 Georgea_edgar@yahoo.com
Submission	Answer
Filer's Name	Anne Steinfeldt
Filer's e-mail	asteinfeldt@visi.com, george_edgar@yahoo.com
Signature	/anne steinfeldt/
Date	10/18/2010
Attachments	Tyson_Crispito_Office Action_Feb 13, 2003_76450803.pdf (5 pages)(67569 bytes) PNO=91196417-Everfresh_Answer of Opposition.pdf (4 pages)(86347 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/450803

APPLICANT: Tyson Foods, Inc.

CORRESPONDENT ADDRESS:

ESSA HICKS
TYSON FOODS, INC.
1601 N.W. EXPRESSWAY, SUITE 1700
OKLAHOMA CITY, OKLAHOMA 73118-0437

RETURN ADDRESS:

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513
ecom111@uspto.gov

MARK: CRISPITOS

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

TO AVOID ABANDONMENT, WE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF OUR MAILING OR E-MAILING DATE.

Serial Number 76/450803

The assigned examining attorney has reviewed the referenced application and determined the following.

REFUSAL UNDER SECTION 2(e)(1)

The examining attorney refuses registration on the Principal Register because the proposed mark merely describes the goods/services. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1); TMEP §§1209 *et seq.*

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods/services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright?Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP §1209.01(b).

Here, the applicant's mark is CRISPITOS, for goods described as "tortillas filled with chicken and pizza sauce, chicken and cheese, chicken and vegetables, or chicken and chili; tortillas filled with fruit."

The term “crisпитos” appears to be a commonly-used term to describe a type of Mexican-style food. In support of this position, the examining attorney attaches excerpts of 17 stories taken from the LEXIS/NEXIS computerized database. The examining attorney conducted a search of the term "CRISPITO" which resulted in 115 hits. These excerpts clearly show that the term “crispito” an the plural form, “crisпитos” has gained common and wide usage as the name for a type of Mexican-style food product. [\[1\]](#)

For example, one story specifically refers to a crispito as a fruit-filled tortilla:

Copyright 1987 Little Rock Newspapers, Inc.
Arkansas Democrat-Gazette

July 31, 1987, Friday

LENGTH: 516 words

HEADLINE: Bill Lewis237090 Nancy Wells and Gray Mack relax after an outdoor meal at Gringo's.

BODY:

... little item that tops off the usual Tex-Mex fare in fine, appropriate style. It's called a crispito, and Hill said he inherited it from the previous owner of Gringo's.

Crisпитos are tubes of flour tortillas filled with either cherry or apple pie filling, deep-fried and rolled in cinnamon and sugar, and ...

Other stories refer to crisпитos as fried tortillas filled with chicken and covered with chili. For example:

Copyright 2001 The Commercial Appeal, Inc.
The Commercial Appeal (Memphis, TN)

August 29, 2001 Wednesday Final Edition

SECTION: APPEAL; Pg. E1

LENGTH: 1194 words

HEADLINE: 'A' IN NUTRITION;
SCHOOLS AHEAD OF LEARNING CURVE ON FOODS

BYLINE: Cindy Wolff, wolff@gomemphis.com

... like broccoli."

Miller said broccoli is popular at the school, but the favorite item is a concoction called a crispito, which is a chicken burrito smothered in chili.

Shelby County school lunches cost \$1.25 in elementary schools and \$...

The applicant's mark, CRISPITOS is descriptive of a feature and characteristic of the goods. As such, the mark is refused registration under Section 2(e)(1).

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the

following informality.

INCORRECT CLASSIFICATION

The applicant has classified the goods incorrectly. The applicant must amend the application to classify the goods in International Class **30**. 37 C.F.R. §§2.32(a)(7) and 2.85; TMEP §§1401.02(a) and 1401.03(b).

OFFICE SEARCH INFORMATION

Although the examining attorney has searched the Office records and has found no similar *registered* mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d), the examining attorney encloses information regarding pending Application Serial No. 76/222761. 37 C.F.R. §2.83.

There may be a likelihood of confusion between the applicant's mark and the mark in the above noted application under Section 2(d) of the Act. The filing date of the referenced application precedes the applicant's filing date. If the earlier-filed application matures into a registration, the examining attorney may refuse registration under Section 2(d).

A prompt response to this Office Action will expedite prosecution.

Mitchell Front /mf/
Trademark Attorney, Law Office 111
(703) 308-9111 ext. 122

How to respond to this Office Action:

To respond formally using the Office's Trademark Electronic Application System (TEAS), visit <http://www.uspto.gov/teas/index.html> and follow the instructions.

To respond formally via E-mail, visit <http://www.uspto.gov/web/trademarks/tmelecresp.htm> and follow the instructions.

To respond formally via regular mail, your response should be sent to the mailing Return Address listed above and include the serial number, law office and examining attorney's name on the upper right corner of each page of your response.

To check the status of your application at any time, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at <http://tarr.uspto.gov/>

For general and other useful information about trademarks, you are encouraged to visit the Office's web site at <http://www.uspto.gov/main/trademarks.htm>

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY.

[\[1\]](#) The Trademark Trial and Appeal Board has held that materials obtained through computerized text searching are competent evidence to show the descriptive use of terms under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). *In re National Data Corp.*, 222 USPQ 515, 517 n.3 (TTAB 1984).

CRISPITO BURRITO

Serial Number

76222761

Status

PUBLICATION/ISSUE REVIEW COMPLETE

Word Mark

CRISPITO BURRITO

Type of Mark

TRADEMARK

Register

PRINCIPAL

Mark Drawing Code

(1) TYPED DRAWING

Owner

Taco John's Seasonings Limited Partnership LIMITED PARTNERSHIP WYOMING
808 West 20th Street Cheyenne WYOMING 82001

Goods/Services

Class Status -- ACTIVE. IC 030. US 046. G & S: BURRITOS, FOR
CONSUMPTION ON OR OFF THE PREMISES.

Disclaimer Statement

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "BURRITO" APART FROM
THE MARK AS SHOWN.

Filing Date

2001/03/09

Examining Attorney

LORENZO, ROBERT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK
TRIAL AND APPEAL BOARD

Answer of Opposition – Proceeding Number 91196417
Application No. 77893758

Notice is hereby given that the following party answers opposition of the indicated application.

Defendant Information

Application number	77893758
Address	Everfresh Food Corporation 501 Huron Blvd S.E. Minneapolis, MN 55414 UNITED STATES 612.331.6393 asteinfeldt@visi.com
Correspondence Information	Everfresh Food Corporation 501 Huron Blvd S.E. Minneapolis, MN 55414 UNITED STATES 612.331.6393 asteinfeldt@visi.com

Plaintiff Information

Plaintiff	Tyson Foods, Inc 2200 Don Tyson Parkway Springdale, AR 72762 UNITED STATES 479.290.4661 Jenna.johnston@tyson.com
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Goods/Services Allegedly Affected by Plaintiff's Opposition

Class 30.

All goods and services in the class are opposed, namely: Grain-based snack foods

Plaintiff's Alleged Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Plaintiff as Basis for Opposition

U.S. Registration No.	2822371	Application Date	09/12/2002
Registration Date	03/16/2004	Foreign Priority Date	NONE
Word Mark	CRISPITOS		

Design Mark	CRISPITOS
Description of Mark	None
Goods/Services	Tortillas filled with [chicken and pizza sauce,] chicken and cheese, chicken and vegetables, or chicken and chili; tortillas filled with fruit.

U.S. Registration No.	85083721	Application Date	07/13/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	CRISPITOS		

Design Mark	CRISPITOS
Description of Mark	None
Goods/Services	Tortillas filled with egg, pork and cheese.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/anne steinfeldt/
Name	Everfresh Food Corporation
Date	10/18/2010

Everfresh Food Corporation will not abandon its right to pursue the use of the “CRISPITOS” mark for a grain-based snack product.

Everfresh Food Corporation believes it has the right to use the mark “CRISPITOS” for a grain-based snack food that does not compete with Tyson’s business operations which are conducted in four segments: Chicken, Beef, Pork and Prepared Foods. Tyson’s Prepared Foods operations include manufacturing and marketing frozen and refrigerated food products.

Everfresh Food Corporation believes that its use of the mark “CRISPITOS” for a grain-based snack will not cause confusion, mistake or deception among customers of Tyson Foods, Inc.

Everfresh Food Corporation notes that in the Plaintiff’s application No. 76450803 the examining attorney initially refused registration of the “CRISPITOS” mark under section 2(e)(1). The examining attorney found CRISPITOS to be descriptive of a feature and characteristic of the goods. The examining attorney notes, “The term ‘crispitos’ appears to be a commonly-used term to describe a type of Mexican-style food. In support of this position, the examining attorney attaches excerpts of 17 stories taken from the LEXIS/NEXIS computerized database. The examining attorney conducted a search of the term “CRISPITO” which resulted in 115 hits. These excerpts clearly show that the term “crispito” and the plural form, “crispitos” has gained common and wide usage as the name for a type of Mexican-style food product. [Attached]

The grounds for Everfresh Food Corporation’s unwillingness to abandon the pursuit of the trademark are as follows:

1. Everfresh Food Corporation (Defendant) is a corporation having a principal place of business at 501 Huron Boulevard, SE, Minneapolis, Minnesota 55414.
2. Upon information and belief, Tyson Foods, Inc. is a business at 2200 Don Tyson Parkway, Springdale, Arkansas 72762.
3. Defendant accepts that Plaintiff has continuously used the mark “CRISPITOS” in association with tortillas filled with chicken and cheese, chicken and vegetables, and chicken and chili; and with fruits since as early as 1985. And, Plaintiff is the owner of the United States Registration No. 2,822,371 registered on March 16, 2004.
4. Defendant accepts that Plaintiff is the owner of the U.S. application No. 85-083721 to register the mark “CRISPITOS” for tortillas filled with egg, pork and cheese. This mark is still pending. Defendant does not accept Plaintiff’s statement that this mark has been used since as early as 2005. Defendant has seen no evidence of this statement.
5. Defendant accepts that Plaintiff has expended effort and expense in advertising, promoting and offering for sale and selling its good under the CRISPITOS mark in the United States. Defendant does not agree that Plaintiff’s “CRISPITOS” mark has been widely and favorably known throughout the United States and has become recognized to consumers/customers as identify and distinguishing Plaintiff as to the source and origin of the associated goods bearing the “CRISPITOS” mark.
6. Defendant disagrees with Plaintiff’s statement that the goods listed in International

Class 30 for the mark "CRISPITOS" are highly similar or related to the goods sold in association with Plaintiff's "CRISPITOS" mark. Defendant's "CRISPITOS" mark does not resemble Plaintiff's "CRISPITOS" mark and it is not likely to be confused and mistaken. Defendant's "CRISPITOS" mark is not the same as Plaintiff's "CRISPITOS" mark. Defendant's "CRISPITOS" mark will not cause confusion and lead to deception as to the origin of Defendant's goods associated with Plaintiff's "CRISPITOS" mark.

7. Defendant agrees that Plaintiff is the first user of the "CRISPITOS" mark.

Defendant does not agree that Plaintiff has priority to the mark.

8. Defendant does not agree that if it is permitted to register and use the "CRISPITOS" mark for goods in International Class 30, US 046 confusion in trade resulting in damage and injury to Plaintiff will be caused and will result by reason of the similarity between Defendant's mark and the Plaintiff's "CRISPITOS" mark. If Defendant is allowed to register the "CRISPITOS" mark, it will not obtain statutory rights to the mark that will conflict with and substantially degrade Plaintiff's rights in the United States Registration No 2,822,371. Defendant does not agree that Plaintiff has superior common law rights to the "CRISPITOS" mark. Defendant does not agree that Plaintiff goodwill and reputation will be jeopardized by Defendant's registration of the "CRISPITOS" mark in International Class 30, US 046. G & S: Grain-based snack foods. The quality of the Defendant's goods will not harm Plaintiff's reputation or translate to lost sales. Defendant will not be enriched by its use of the "CRISPITOS" mark nor will it reap the benefit of Plaintiff's goodwill and reputation.

9. Defendant disagrees that if it is granted the registration it does not have a prima facie exclusion right to use the mark. Such registration will not be a source of damage or injury to Plaintiff.

WHEREFORE, Defendant prays that USSN 77/893,758 be accepted with respect to the goods specified in International Class 30 and that its Opposition be rejected.

Attached: 13-Feb-2003

Offc Action Outgoing